

1 Gregory J. Yu (State Bar No. 133955)
GLOBAL LAW GROUP
2 2015 Pioneer Court, Suite P-1
San Mateo, CA 94403
3 Telephone: (650) 570-4140
Facsimile: (650) 570-4142
4 E-mail: glgroup [at] inreach [dot] com

5 Attorney for Plaintiffs and Proposed Class and Subclasses

6
7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION

11 KINDERSTART.COM LLC, a California
12 limited liability company, on behalf of itself and
all others similarly situated,

13 Plaintiffs,

14 v.

15 GOOGLE, INC., a Delaware corporation,

16 Defendant.

Case No. C 06-2057 JF

**OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS/STRIKE
SECOND AMENDED COMPLAINT**

Judge: Hon. Jeremy Fogel
Date: October 27, 2006
Time: 9:00 a.m.
Courtroom: 5th Floor, Room 3

17
18 **INTRODUCTION**

19 Defendant Google Inc. ("Google") brings a trio of simultaneous motions to obfuscate the
20 real procedural dispute between the parties before the court at this time. The Seconded
21 Amended Class Action Complaint ("SAC") was filed by Plaintiffs pursuant to Federal Rules of
22 Civil Procedure ("Fed.R.Civ.P.") 15(a).¹ The task is to assess whether the SAC properly and
23 fully states facts to support the six discrete causes of action. Google's intent and actions seem
24 to simplify this class action to a single dispute of the website of KinderStart.com LLC
25 ("KinderStart") against the world's dominant search engine. As a putative class action by three
26

27
28 ¹ The Court's July 13, 2006 order ("July 13 Order") dismissed the First Amended Complaint
("FAC") "with leave to amend." July 13 Order at 13.

1 classes and two California subclasses, the SAC required detailed notice of the action.

2 ARGUMENT

3 I. THE SAC SHOULD NOT BE SUBJECT TO DISMISSAL UNDER RULE 8

4 Google's objections under Rule 8 can be distilled down to three points – length,
5 relevance and use of ellipses in a single sentence taken from Google's own website.

6 **Length.** The motion claims the SAC contains conclusory statements that certain
7 allegations are unintelligible.² Google takes exception to allegations that at worst have a string
8 of words to explain the possible means or motives for Google's actions against Websites.
9 Nonetheless, the court may and should discern whether Google simply cannot understand the
10 meaning or it is unwilling to address the allegation squarely.

11 As far as length of the SAC, the causes of action each involve the pleading of multiple,
12 often complex, elements for liability. KinderStart's intention to seek class certification means
13 that Google and the court must have the precise bases for class action treatment under
14 Fed.R.Civ.P. 23(a). Plaintiffs believe that the length and included detail are clearly justified, but
15 Google prefers to simply count paragraphs and pages.

16 Six separate causes of action are set forth in the SAC, four of which stem from Federal
17 law, including the Constitution. Of particular note, Counts One and Two relate to the Sherman
18 Act. These required the following: (1) description of the relevant markets and market shares, (2)
19 identification of the barriers to entry, and (3) seven separate species of anticompetitive conduct
20 of defendant. SAC ¶¶ 33-64, pp. 7-19. Anticompetitive conduct requires specific details so that
21 Google may be fairly put on notice of the alleged composite anticompetitive effect on
22 competition. This, of course, needs to be balanced by the restriction against a heightened
23 pleading standard for antitrust actions. *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 108-09
24 (2nd Cir. 2005). Plaintiffs' Count Four claim First Amendment and California free speech
25 violations by Google. Supreme Court and Ninth Circuit precedent requires of plaintiffs detailed

26
27 ² Google recites six paragraphs from the SAC that it claims are unintelligible. This is its
28 opinion, but Plaintiffs believe their meaning is apparent. However, rather than challenge and
defend the language of each challenged allegation, Plaintiffs defer to the Court to make its own
assessment of intelligibility.

1 allegations of entwinement, influence and control between the state actor and a government
 2 body. Since that relationship between Google and universities and libraries is deep and
 3 pervasive, the complaint required extensive detail for both the court and for Google to consider.
 4 SAC ¶¶ 83-115, pp. 22-30. This avoids the problem that a plaintiff could face with conclusory
 5 allegations of state action. Google responded in its concurrent Rule 12(b)(6) motion (“MTD”)
 6 with a single page to discount the impact and importance of Google to the financial and risk
 7 facing the universities and the libraries. *MTD* at 20. Next, as to the third federal cause of action,
 8 Lanham Act, the specific representations and their alleged breach by Google was required as a
 9 foundation for both the false representations as anticompetitive conduct in and of itself and false
 10 advertising under the law. SAC ¶¶ 116-39. Defendant’s practices as to PageRank and Blockage
 11 and the reasons therefor are complex and convoluted on their own. These required notice and
 12 detail for Google to account for these varied representations as well the extent to which any of
 13 them were misleading and/or were breached by Google. Finally, many of the causes of action in
 14 the SAC turn on the motive, intent, justification or lack of justification of actions by Google.

15 More importantly, Google’s motion ignores that this is a putative class action. The
 16 leading commentators on federal procedure state:

17 Thus, actions of this type [class action or a shareholder or derivative suit] must comply
 18 with the usual requirements [of Rule 8] for a complaint. In reality, of course, the very
 19 complexity of these cases obliges the pleader to plead in great detail.

20 Wright & Miller, *Federal Practice and Procedure: Civil 3d* § 1231 (2004). If Plaintiffs simply
 21 abided by Google’s wishes for a shorter complaint, Plaintiffs would be otherwise forced to make
 22 omit important details to provide defendant sufficient notice to admit or deny the allegation.
 23 Furthermore, omission could lead to inappropriate legal conclusions. This was precisely the
 24 problem faced by class action plaintiffs in *In re Rezulin Prods. Liability Litigation*, 2002 WL
 25 31852826 (D.C.N.Y. 2002). While class certification has not yet been addressed by the court or
 26 the parties here, the Second Amended Complaint must fully comply with the rigor of Rule 23 for
 27 federal class actions. Accordingly, Plaintiffs spent 30 paragraphs to speak about the basis for
 28 KinderStart’s representation of the class, outline the class allegations, and describe specifically

1 the three putative classes and two putative California subclasses.

2 Rules 12(b)(6) and Rule 8(a) are consistent in their requirement and the causes of action
 3 pled by Plaintiffs do not require greater particularity under the Federal Rules of Civil Procedure.
 4 But Google's use of both rules here are inconsistent. It objects to the lack of details in numerous
 5 instances in the MTD but wants the court to dismiss the complaint primarily because of its
 6 length. Even if length were the only factor, federal circuits including the Ninth Circuit have
 7 approved dismissal for complaints far longer than the instant 282-paragraph, 63-page class
 8 action complaint, filed without any exhibits or attachments whatsoever. *See Carrigan v. Calif.*
 9 *State Legislature*, 263 F.2d 560, 566-67 (9th Cir.), *cert. denied*, 359 U.S. 980, 79 S. Ct. 901, 3 L.
 10 Ed. 2d 929 (1959) (complaint contained 150 pages); *In re Westinghouse Securities Litigation*, 90
 11 F.3d 696, 702-03 (3d Cir. 1996) (600 paragraphs spanning 240 pages); *Kuehl v. FDIC*, 8 F.3d
 12 905, 908-09 (1st Cir. 1993) (358 paragraphs in 43 pages); *Michaelis v. Nebraska State Bar*
 13 *Association*, 717 F.2d 437, 439 (8th Cir. 1983) (144 paragraphs in 98 pages); *United States v.*
 14 *Lockheed-Martin Corp.*, 328 F.3d 374, 378-79 (7th Cir. 2003) (400 paragraphs covering 155
 15 pages, and followed by 99 attachments). Within the Ninth Circuit, in view of the complexity of
 16 a federal class action with six causes of action alleged in the SAC, Plaintiffs do not believe that
 17 Rule 8(a) has been violated.

18 Even if a violation of the Rule has occurred, complete dismissal with prejudice seems
 19 inappropriate simply due the length of the SAC. However, the Ninth Circuit has opined: "Such
 20 [dismissal] orders are not favored . . . , but when they are made, ample opportunity for
 21 amendment should be provided in all except the most unusual cases. *See* III Moore's Federal
 22 Practice para. 15.10." *Bertucelli v. Carreras*, 467 F.2d 214, 215 (9th Cir. 1972).

23 **Claimed Irrelevance and Immateriality.**

24 Irrelevance arises under Rule 12(f) if "it is clear that the matter to be stricken could have
 25 no possible bearing on the subject matter of the litigation." *LeDuc v. Kentucky Central Life Ins.*
 26 *Co.*, 814 F. Supp. 820, 830 (N.D. Cal. 1992). Allegations in the complaint may be immaterial if
 27 they have no bearing on the controversy, which seems to be a rigid standard for both Google and
 28 the court to rely upon. *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on*

1 *other grounds*, 510 U.S. 517, 534-35 (1994).

2 While Google objects to the relevance or importance of several paragraphs to the case,
 3 the majority of them relate to either the alleged relevant markets or anticompetitive conduct
 4 under the Sherman Act. SAC ¶¶ 50, 53, 54, 56-57, 58(d)(2), 59, 60(g), 62(c). The nature of the
 5 market and the genres of conduct by Google required detail, explanation and background. Even
 6 as argued in Plaintiffs' opposition to the MTD, the harm focuses on competition and not just
 7 competitors. These allegations identified and described harm to the market as a whole and its
 8 participants.³ As to false representations before the SEC, this is not a securities fraud action
 9 necessitating the pleading of required elements. Instead, specific precedent allows Plaintiffs to
 10 identify misleading representations to adjudicatory bodies as further evidence of anticompetitive
 11 conduct. Google also questions the purpose of alleging details of copyright litigation. This is
 12 relevant because they further buttress Plaintiffs' argument of entwinement based upon Google's
 13 critical indemnification of university libraries for massive copyright infringement liability. SAC
 14 ¶¶ 101-13. Finally, the allegations concerning blockage focus on the various reasons and
 15 methods used by Google that violate of First Amendment rights of Class III Plaintiffs and
 16 California Subclass I Plaintiffs.

17 **Use of Ellipses.**

18 Google identified a paragraph in the SAC referring to its policies on censorship, Website
 19 removal and disclosure. SAC ¶ 146. It decries the omission of wording from a statement within
 20 its policies on censorship and Website treatment. Plaintiffs believe that users interpret this
 21 guarantee of disclosure broadly in the context of the myriad policies, guidelines and reasons that
 22 lead to Website removal by Google. Even the inclusion of local "policies" as grounds for site
 23 removal is not defined by Google. Indeed, it serves as the sole author and sole enforcer for
 24 removal in the first place.⁴ When Google formulates detailed webmaster guidelines for a given

25 _____
 26 ³ It is incorrect to say the only allegations acceptable here are ones where the class representative
 27 has experienced the very same injury as that from each specific type of anticompetitive conduct.
 28 Here, the antitrust plaintiff "must allege and provide harm, not just to a single competitor but to
 the competitive process, i.e. competition itself." *NYNEX Corp. v. Discon Inc.*, 525 U.S. 129,
 134, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998).

⁴ The section of the Web Search Help Center appearing in the SAC ¶ 146 drew the attention of
 OPPOSITION TO DEFENDANT'S MOTION TO Case No. C 06-2057 JF
 DISMISS/STRIKE SECOND AMENDED COMPLAINT

1 market, those are local policies in and of themselves. Google's policies are Webmaster
 2 guidelines that are completely open-ended for interpretation and application by Google *itself*.
 3 *See Declaration of Randall McCarley*, attached as Exhibit 1 hereto, ¶ 4. It would appear that
 4 Google inserted this policy on censorship, site removal and disclosure to instill greater
 5 confidence and transparency in its search results for the benefit of the user.

6 The fundamental flaws are both in the underlying Website guidelines are that they
 7 effectively offer some signal of removal and censorship for the benefit of the search user.
 8 However, the incidence and cause for removal is totally left for Google to fashion. On another
 9 page of its Website, Google warns: "We won't comment on the individual reasons a page was
 10 removed, and **we don't offer an exhaustive list of practices that can cause removal.**" SAC ¶
 11 154 (emphasis added). When all these allegations are taken together, users can mistakenly
 12 believe a promise that they will receive objective results and view everything in a world where
 13 Google indexes everything it finds. When Website removal fails to be fully disclosed, Google
 14 further elevates its message of objectivity behind its search engine. For this reason, the reader
 15 and user faces deserves better in reality, but may well be confused and even misled. In light of
 16 this, it constituted one of several misleading statements forming the basis for Plaintiffs' Lanham
 17 Act claim. Given Google's amorphous wording on censorship and its limitless range of reasons
 18 for page removal, the user and webmaster should arguably expect full disclosure of Website
 19 removal.

20 **II. THE LANHAM ACT CLAIM UNDER RULE 15(A) SHOULD BE ALLOWED.**

21 Google complains of Plaintiffs' addition of Count Three, the Lanham Act, 15 U.S.C. §
 22 1125(a) in the SAC. The basis for this count relates to the alleged false advertising of
 23

24 Google such that it produced a further Declaration of Matt Cutts attaching the entire answer to
 25 the question, "Does Google censor search results?" from Google's website as of September 28,
 26 2006. In a review of the same page from the website as of October 13, 2006, the answer
 27 furnished on this page actually omits a sentence that appeared in the September 28, 2006 version
 28 provided by Mr. Cutts. That sentence now omitted by Google and no longer appearing is:
***"Please note: For some older [search results] removals (before March 2005), we may not
 show a notice at this time."*** This change in just over two weeks in Google's stated results
 removal policies as displayed is indicative of perhaps some of the confusion wrought by
 Google's past stated policies an actual practices that affect users and websites..

1 guaranteed objectivity of search results and PageRanks. SAC ¶¶ 238-42. The disclosure of
2 Website removal from results was an additional representation that is alleged to mislead users.
3 SAC ¶ 243. Google insists on a separate leave to amend to add a new cause of action under the
4 SAC, when leave under Rule 15(a) to file the SAC was already granted in the first place. This
5 concept appears to defeat the very purpose behind a leave to amend granted under Rule 15(a). It
6 is undisputed that the SAC was filed under Rule 15(a).

7 The argument of Google is inconsistent with the policy of liberality behind Rule 15. As
8 stated by the leading commentators on federal procedure, “No longer is a party to be irrevocably
9 bound to the legal theory or factual theory in his first pleading.” Wright, Miller & Kane, Federal
10 Practice and Procedure: Civil 2d § 1472 (1990). The Ninth Circuit has held: “This liberality in
11 granting leave to amend is not dependent on whether the amendment will add causes of action or
12 parties. It is, however, subject to the qualification that amendment of the complaint does not
13 cause the opposing party undue prejudice [citation omitted].” *DCD Programs, Ltd. v. Leighton*,
14 833 F.2d 183, 186 (9th Cir. 1987).

15 The only apparent prejudice against Google is if new facts are alleged that yield a new
16 claim, KinderStart could not relate the SAC back to the date of the filing of the FAC on April
17 12, 2006 for statute of limitation purposes. The motion fails to raises any prejudice experienced
18 by Google from the Lanham Act claim. However, even if it did, there is none. “A Rule 15(a)
19 amendment that asserts a new claim arising out of the conduct, transaction or occurrence” set
20 forth in the original pleading will fall under Rule 15(c) and relate back to the date of the original
21 pleading. *Wright, Miller & Kane*, § 1474. Since the Lanham Act has no such statute, the Ninth
22 Circuit requires that the time bar be based on the statute of limitations related state causes of
23 action in the state where the trial court sits. *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304
24 F.3d 829, 836 (9th Cir. 2002).

25 Plaintiffs allege in the SAC that the Lanham Act violations arose from
26 misrepresentations concerning search results and PageRank objectivity and PageRank Deflation
27
28

(as defined in the SAC ¶ 12).⁵ These facts were already fully alleged in the original complaint as filed on March 17, 2006. *Complaint*, ¶¶ 22-24. In that these events are alleged to have occurred in late March 2005, the relation back of the Lanham Act claim would mean that it is within the one-year time bar for California libel and slander (California Code of Civil Procedure § 340(c)) and four-year time period for California's Unfair Competition Law (California Business and Professions Code ("B&PC") § 17208)). Furthermore, the time between the FAC and SAC was five months, which would not seem to unfairly burden or prejudice defendant.

Overall, the July 13 Order allowed Plaintiffs leave to amend all counts that appeared in the FAC, and was not precluded from a new count based on the same facts. Plaintiffs withdrew four of the original nine counts, and added a single federal claim under the Lanham Act, which is related to the false advertising prong under B&PC § 17200, discussed in the concurrently filed Opposition to the MTD. Therefore, it should be considered and not stricken under Rule 8(a).

CONCLUSION

Based on the foregoing arguments of Plaintiffs and the entire file herein, Plaintiff urges that Google's motion to dismiss and/or strike under Rule 8(a), 8(e) and 41(b) and Rule 12(f) be denied in its entirety, and that, if defendant's other concurrent motions are denied, that Google be ordered to proceed to answer SAC . To the extent that the Court finds any pleading defects to warrant dismissal of any count within the SAC, Plaintiffs respectfully request that the Court in view of liberal pleading practices in Federal court allow a suitable third amendment to the complaint to be promptly filed and served pursuant to Rule 15(a).

Dated: October 13, 2006

GLOBAL LAW GROUP

By: _____/s/ Gregory J. Yu

Gregory J. Yu, Esq.

Attorney for Plaintiff KinderStart.com LLC and
for the proposed Class and Subclasses

⁵ The only new facts in the SAC supporting the Lanham Act claim relate to the alleged non-disclosure of Website removal (SAC ¶¶ 136, 243).